

future long distance offerings when it can lawfully make those offerings directly to in-Region Customers.

II. THE PROVISION OF INTERNET SERVICES, EVEN WITH A GSP AGREEMENT, VIOLATES SECTION 271

As the Commission noted in the WorldCom/MCI Order, Internet Services include Internet Backbone service (identified therein as a discrete economic market), Internet access services, and other services such as web-hosting and other information services.⁶⁶ The Commission further identified three distinct classes of participants: end users, Internet service providers (ISPs) and Internet backbone providers (IBPs). End users send and receive information; ISPs allow end users to access Internet backbone networks; and IBPs route traffic between ISPs and interconnect with other IBPs.⁶⁷ Qwest provides interLATA Internet access,⁶⁸ backbone⁶⁹ and information services in U S West territory.

⁶⁶ Memorandum and Order, Application of WorldCom, Inc., and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Dkt No. 97-211 (rel. Sept. 14, 1998) ("WorldCom/MCI Order").

⁶⁷ Id., ¶ 144.

⁶⁸ See Comments of AT&T Corp., filed in this proceeding on October 1, 1999, at 7, including Direct Internet Access, Dial Up and DSL.

⁶⁹ Id. Qwest touts itself as the primary backbone provider for Internet Service Providers ("ISP's") including at least one headquartered within U S West's region (Electric Lightwave Inc.). Other ISPs include Verio, Cable & Wireless and Mindspring. Moreover Qwest claims that it has leveraged its Internet2 sponsorship into university and state government markets, so that today 25% of Internet2 universities are current customers. Id. at 8 and n.28. Qwest will also continue to provide technical assistance to the in-region portion of the next generation Internet science research network operated by UCAID, the transmission portion of which will be contributed, in the form of IRUs, to a non-profit organization and sell IRUs for in-region facilities. Report at 28, n. 43.

As shown below, Qwest's continued provision of Internet backbone and access services, even with the GSP plan, violates Section 271.⁷⁰

A. Qwest's Proposed GSP Plan

Under the Divestiture Plan, Qwest intends to continue to provide Internet services including Internet access, web hosting and Internet backbone service but will not provide the in-region interLATA transmission associated with those services.⁷¹ That service will be provided, by Touch America pursuant to a "Layer One Global Service Provider Agreement."⁷²

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⁷⁰ The terms of the 1996 Act, make clear that the term "interLATA services" includes interLATA Internet access and backbone service. In particular, whereas section 272 draws a distinction between "interLATA telecommunications services" (section 272(a)(2)(B)) and "interLATA information services" (section 272(a)(2)(C)), section 271(a) uses the general term "interLATA services," thereby confirming that the prohibited services include both telecommunications and information services. Indeed, the list of "incidental" interLATA services specifically includes one form of Internet service: "two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools." § 271(g)(2). The fact that Congress took care to exempt Internet service over dedicated facilities to elementary and secondary schools from the general prohibition further demonstrates that interLATA provision of Internet access to other users is an interLATA service that the BOCs may not provide prior to obtaining section 271 authority. Because the separate affiliate requirement for information services has now expired (see § 272(f)(2)), the BOCs would not be required to provide interLATA Internet access through a separate affiliate.

⁷¹ Id., at 63.

⁷² And for approximately 2,600 customers in region to whom Qwest provides dial-up service Internet access services by Concentric, although that GSP contract, if there is one, is not provided.

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76 Although who will handle the transport from (and to) the public peering points to Qwest's backbone is unclear.

77 Report at 69. And presumably public peering interconnection arrangements as well.

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79 Report at 70. Presumably this also includes all "Transit" relationships whereby Qwest will continue to carry that providers' traffic to an interconnecting backbone for a fee.

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Under this proposal, Qwest will clearly be providing prohibited interLATA services. The only difference post "divestiture" will be that Qwest will outsource the interLATA transmission.

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B. The Provision of Internet Backbone Service, Even with the GSP Agreement, Violates Section 271

Internet backbone facilities are used to route Internet traffic between Internet Service Providers ("ISPs") and to interconnect with other Internet Backbone Providers ("IBPs").⁹⁰ The facilities consist of "routers connected together by high-speed data

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90 MCI-WorldCom Order ¶143.

lines.”⁹¹ The transporting and routing of packets between and among ISPs and regional backbone networks can be done in one of three ways: (1) the interconnection of Internet networks at public peering points, referred to as Network Access Points (“NAPs”); (2) to avoid the chronic problem of congestion at the NAPs, settlements-free private peering; or (3) “transit arrangements” pursuant to which, for a fee, an IBP agrees to transport the traffic to terminating points on its network or on the networks of other IBPs with whom it has a private peering relationship -- alternatively, an IBP might agree to a “paid-for” private peering relationship allowing traffic to be terminated on its network. Tier 1 providers are U.S. nationwide (or worldwide) Internet backbones, which provide nationwide Internet services using extensive owned or leased fiber facilities. They generally have settlements-free private peering connections with the other Tier 1 national backbone providers. “The essential service provided by IBPs is transmission of information between all users of the Internet,”⁹² and because those users are typically scattered throughout the country and even the world, IBPs necessarily are providing an interLATA service.⁹³

The operation of the routers which, based on the traffic in the network ascertain the most efficient route to route the interLATA traffic is inextricably intertwined with the transport itself. Because Qwest’s Internet backbone facilities provide interLATA services, are located in part in U S West’s territories, and presumably carry some

⁹¹ Id. ¶ 143 n.383.

⁹² Id. ¶ 144.

⁹³ See id. ¶148 (“These Internet backbone services can ensure the delivery of information from any source to any destination on the Internet”).

interLATA traffic that originate in those territories, Qwest's proposed provision of those services violates Section 271. There is no information service separate and apart from the interLATA transmission service. Indeed U S West effectively conceded—as it had to—that Section 271 precludes it from owning and operating in-region Internet backbone facilities when it filed a petition with the Commission asking it to forbear from enforcing Section 271 against any Internet backbone facilities it sought to provide and operate.⁹⁴ The Commission denied U S West's request, and found that “because of the central importance of the requirements in Sections 251(c) and 271 to opening local markets to competition,” those sections are the “cornerstones of the framework Congress established in the 1996 Act.”⁹⁵ Accordingly, the Commission found that it must apply Section 271 according to its terms and refused to allow U S West and other RBOCs to own and offer interLATA, Internet backbone facilities.⁹⁶

The Applicants assert that their proposal “is modeled closely on the existing arrangements of the other BOCs.”⁹⁷ But the lawfulness of these arrangements has never been tested. In all events, none of the other BOCs currently provide Internet Backbone service. To the contrary, Bell Atlantic's and GTE's current efforts to divest itself of its Internet backbone reflect their understanding that providing such a service in any form would violated Section 271.

⁹⁴ Petition of U S West Communications Inc for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11.

⁹⁵ Section 706 Order ¶ 76.

⁹⁶ Id. ¶¶ 65-82.

⁹⁷ Report at 67.

Thus, the plain terms of the Act, Applicants' own concessions, and the Commission's prior decision confirm that Qwest's proposed provision of Internet Backbone services, even with the GSP Agreement, would violate Section 271.

C. The Provision of Internet Access Service, Even with the GSP Agreement, Violates Section 271

The Applicants argue that the Non-Accounting Safeguards Order expressly rejected the argument that a BOC violates Section 271 where an unaffiliated carrier separately provides end users with the interLATA component of an information service. They note that the Non-Accounting Safeguards Order defined an interLATA information service as "an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component, provided to the customer for a single charge." They further argue that the Bureau in the Bell Atlantic CEI Order, held that the opposite conclusion obtains where the impermissible interLATA transmission component is broken out and provided separately by an unaffiliated carrier. Here, Applicants argue, Touch America, not Qwest, will be providing all in-region interLATA transmission services to the end users pursuant to an independent contract between Touch America and the end user.

Applicants are misconstruing the Non-Accounting Safeguards Order. The Commission held there that section 271 prohibits a BOC from offering an information service that utilizes, as a necessary component, interLATA telecommunications transmission. In particular, the Commission "conclude[d] that the term 'interLATA services' encompasses both interLATA information services and interLATA

telecommunications services.”⁹⁸ The Commission further explained that “the term ‘interLATA information service’ refers to an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component, provided to the customer for a single charge.”⁹⁹ The Commission thus held that “whenever interLATA transmission is a component of information service, that service is an interLATA information service, unless the end user obtains that interLATA transmission service separately, e.g., from its presubscribed interexchange provider.”¹⁰⁰

In its Non-Accounting Safeguards Order, the Commission specifically applied these holdings to “BOC-provided Internet access services.”¹⁰¹ The Commission thus concluded that “[i]f a BOC’s provision of an Internet or Internet access service . . . incorporates a bundled, in-region, interLATA transmission component provided by the BOC over its own facilities or through resale, that service may only be provided . . . after the BOC has received in-region interLATA authority under section 271.” Id. at 21967 (emphasis added). The Commission

⁹⁸ Non-Accounting Safeguards Order, 11 FCC Rcd. 21905, 21932 (¶ 55) (1996).

⁹⁹ Id. at 21961 (¶ 115). In this regard, the Commission clarified that “an interLATA transmission component is ‘necessary’ to an interLATA information service if it must be used in order for the end-user to make use of this information service capability.” Id. at 21961 n.264. In reaching these conclusions, the Commission relied in part on the D.C. Circuit’s holding that “when information services are . . . bundled with leased interexchange lines, the activity is covered by the [MFJ] decree.” United States v. Western Electric Co., 907 F.2d 160, 163 (D.C. Cir. 1990).

¹⁰⁰ 11 FCC Rcd. at 21965 (¶ 122). In this regard, the Commission “note[d] that even when an information service and interLATA transmission service are ostensibly separately priced, if the BOC offers special discounts or incentives to customers that take both services, this would constitute sufficient evidence of bundling to render the information service an interLATA information service.” Id. at 21964 n. 276.

¹⁰¹ 11 FCC Rcd. at 21966.

recently reaffirmed its general conclusion that BOCs may not provide interLATA information services prior to obtaining section 271 authority,¹⁰² and cited with apparent approval its prior conclusions with respect to Internet access in particular.¹⁰³

In reaching these conclusions, the Commission's Non-Accounting Safeguard's Order cited with approval the decision by the Common Carrier Bureau in the Bell Atlantic CEI Plan Order.¹⁰⁴ That order reviewed the Comparably Efficient Interconnection plan submitted by Bell Atlantic in connection with its planned Internet access service. MFS submitted comments objecting generally to Bell Atlantic's very ability to provide Internet access service prior to obtaining section 271 authority, arguing that "Bell Atlantic will be engaged in the unlawful resale of interLATA service through its proposed [] offering, [b]ecause end users will use Bell Atlantic's proposed service to access computer servers that may be located in the same state, a different state, or another country."¹⁰⁵ In its response to MFS' objections, Bell Atlantic did not deny that it was prohibited by law from providing users with access to web servers located across LATA

¹⁰² Third Order on Reconsideration, Non-Accounting Safeguards, 14 FCC Rcd. 16299, 16331 (1999) (stating that "there can be no possible confusion about this requirement").

¹⁰³ Memorandum Opinion and Order, Petition of U.S. WEST for a Declaratory Ruling Regarding the Provision of National Directory Assistance, 14 FCC Rcd. 16252, 16268 n.76 (1999). In this Order, the Commission also held that the incidental interLATA service exception contained in section 272(g)(4) must be narrowly construed, and that it applies only to the transmission of information stored on a database that the BOC itself owns. Id. at 16265-66. Because Internet access service permits users to access servers owned and operated by a wide number of providers around the world, it is clear that Internet access service does not qualify as an incidental service under section 272(g)(4).

¹⁰⁴ 11 FCC Rcd. 6919 (Com. Car. Bur. 1996).

¹⁰⁵ Id. at 6935.

boundaries. Bell Atlantic, however, claimed that it would “not carry long-distance traffic that originates within its region across LATA boundaries until it receives authorization to provide such services.” In making this claim, Bell Atlantic specifically represented to the Bureau that “in using [BA’s Internet access service], end user customers will have to select, and establish separate arrangements with, interexchange carriers to carry traffic to and from servers on the Internet that are located across LATA boundaries.”¹⁰⁶ On the express basis of these representations, the Common Carrier Bureau concluded that Bell Atlantic will not be engaged in the resale of interLATA telecommunications service. In particular, the Bureau based this conclusion on Bell Atlantic’s “information” that “[t]o connect or transmit to Internet servers or facilities located in other LATAs, the end user customer must have a pre-existing arrangement with an interLATA Internet provider.”

Qwest will not limit itself to providing only intraLATA Internet access and to require customers to obtain separate arrangements with unaffiliated “interLATA Internet providers.” To the contrary, Customers that register to use Qwest’s Internet access service cannot choose an interLATA internet provider, much less have a “pre-existing arrangement” with such a provider.

Because there is no retail market for interLATA Internet transmission, the Customer has no choice of GSPs, prices, or ability to provide a different mix of benefits. Nor is there is any such product as intraLATA Internet access. Any

¹⁰⁶ Id. at 6936.

customer that wished to select another IXC to provide interLATA Internet access (e.g. AT&T), and did not want Touch America could not use Qwest access to provide just the "intraLATA Internet service."

It is thus quite obvious that the transmission provided by the GSP is simply a component of the retail product provided by Qwest. Qwest can make no claim, therefore, that it is simply marketing a product provided by an unaffiliated entity. Thus, its arrangement with Touch America as a GSP is no defense to claim that Qwest is violating section 271 in providing Internet access.

CONCLUSION

The proposed divestiture will not eliminate the Section 271 violation. Because the proposed merger, if completed, would result in unlawful conduct, it is not "consistent with the public interest," and must therefore be denied.

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